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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

T.B., Robert Brenneise, and Allison Brenneise,

Plaintiffs,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Defendant.

Case No. 08 CV 0028 WHQ WMc
(Consolidated with 08 CV 00039 WQH WMc)

SAN DIEGO UNIFIED SCHOOL DISTRICT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS AND/OR STRIKE COUNTERCLAIMS AND FOR SANCTIONS

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Plaintiff,

v.

T.B., a minor, Allison Brenneise and Robert Brenneise, his parents, Steven Wyner, and Wyner and Tiffany,

Defendants.

Date: September 8, 2008
Time: 9:00 a.m.
Courtroom: 4
Judge: Hon. William Q. Hayes

Trial: None Set

Complaint Filed: January 4, 2008

NO ORAL ARGUMENT UNLESS REQUESTED BY COURT

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I. INTRODUCTION

T.B., Allison, and Robert Brenneise ("Brenneises") have failed to raise any convincing arguments in their opposition to the San Diego Unified School District's ("District") motion to dismiss their First, Second and Third Counterclaims. They have stated nothing to avoid the reality that they have failed to state any claims upon which relief may be granted, and have failed to exhaust their administrative remedies with respect to their First and Second Counterclaims. They have likewise failed to counter the District's argument that they had plainly restated a claim that was dismissed previously by this Court.

II. FAILURE TO EXHAUST PRECLUDES THE RELIEF PLED IN THE FIRST AND SECOND COUNTERCLAIMS

A. The First Counterclaim Seeks Impermissible Remedies

The Brenneises' opposition argument to the District's Motion to Dismiss as to the First Counterclaim does not get around the fundamental fact that they are raising claims subsequent to the time period at issue in the underlying administrative proceeding. Such claims for educational injury are clearly subject to the exhaustion of remedies. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163 (9th Cir. 2007). The Opposition concedes that the First Counterclaim is seeking relief for a time period well beyond that covered by the Decision in the administrative proceeding. There is no way around the prohibition from raising these issues on appeal from an IDEA administrative determination without first exhausting the IDEA's administrative procedures.

Congress prescribed these procedures and limits for recovery for educational injury under the IDEA. Simply packaging these claims as seeking relief for such things as moving expense, hedonic injury, or emotional distress as "beyond those obtained in the administrative proceeding in the form of damages" (Opposition at page 2, lines 20, 21) does not alter the basic source of these claims. They all arise out of an injury to T.B.'s educational interests and therefore can be remediated by the IDEA. Indeed, the allegation is that the District denied T.B. a FAPE – an injury only cognizable under the IDEA. As a result, the claims are barred by the IDEA's exhaustion requirement.

The Ninth Circuit has squarely held that exhaustion is not excused simply because the plaintiff couches his claim as one for damages as opposed to for reimbursement or compensatory education. *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 1049 (9th Cir. 2002). Further, any doubts are to be resolved in favor of exhaustion. *Id*., at 1049-54.

Here, plaintiffs, in their Opposition, appear to be claiming that they do not allege any further FAPE violation after the December 4, 2006 IEP, and that it is that IEP that lead to their relocation in March 2008. If that is the case, their Counterclaim, at a minimum, is vague and should be made more definite. But, more to the point, it does not avoid exhaustion because the IDEA's administrative procedures may be able to resolve the injuries arising after the due process hearing – e.g. by providing an alternative to damages for those injuries. If the administrative process can address the problem to any degree, exhaustion is required. *Id*., at 1050.

The First Counterclaim alleges failure to implement the IEP subsequent to the time period adjudicated in the due process administrative hearing. The claim of failure to implement the IEP is an IDEA claim not previously raised at the administrative level. *Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770, 780 (9th Cir. 2007) (recognizing IDEA claim for failure to implement IEP). Irrespective of the attempt to fashion a claim under "other Federal laws protecting the rights of children with disabilities," 20 U.S.C. section 1415(l) demands that the claim first go through due process hearing proceedings.

These IEP implementation claims have not been through the administrative process. The First Counterclaim should be dismissed.

B. The Second Counterclaim Seeks a "Second Bite of the Apple"

The Brenneises have not shown in their Opposition any basis to consider their Second Counterclaim as anything other than a restatement of the previously dismissed Third Claim for Relief alleged in their Amended Complaint that the District failed to implement the December 4, 2006 as modified by the OAH Decision. This contention was not raised in the administrative hearing and cannot be brought up before this Court. There are no arguments presented in the

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Opposition that distinguish the Second Counterclaim from the already dismissed Third Claim for Relief.

Moreover, these claims are also clearly outside of the administrative Decision on appeal. The Opposition admits as much by stating, "The Second Counterclaim is premised on SDUSD's failure to comply with the order in the administrative decision." (Opposition, Page 3, Lines 12,13) As demonstrated in the underlying Motion and restated above, this claim cannot be raised for the first time before this Court.

This Court has already determined that the Brenneises are not seeking to enforce an unappealed favorable final decision. As pointed out in the District's motion, they are challenging the very same aspects of the Decision that they are seeking to enforce. Their enforcement action is therefore premature.

The Opposition seeks to distinguish exhaustion through IDEA due process proceedings as described in 20 U.S.C. section 1415(l) from the enforcement of such a due process decision. For this proposition, the Breneisses cite *Wyner v. Manhattan Beach Unified School Dist.*, 223 F.3d 1026 (9th Cir. 2000). While it is true that this holding bars the administrative agency that rendered the due process decision from enforcing its own ruling, it does not waive exhaustion of administrative remedies for the allegation in the Second Counterclaim. *Wyner*, at 1030, describes the appropriate remedy to enforce an administrative due process determination to be the filing of a complaint with the California State Department of Education. *See also, Christopher S. v. Stanislaus Co. Off. Of Educ.*, 384 F.3d 1205, 1213-14 (9th Cir. 2004) (exhaustion through due process excused when state put on notice of allegations in a state compliance complaint). Filing an action in federal court under the IDEA is not exhaustions of the administrative remedies as plaintiffs contend.

There is no allegation in the Second Counterclaim that the Brenneises filed a complaint to enforce the administrative decision against the District with the California Department of Education or elsewhere. The Second Counterclaim must be dismissed for failure to exhaust.

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II. THERE IS NO BASIS ALLEGED FOR SECTION 504 OR ADA RELIEF

The attempt to bootstrap claims by asserting that they are not under the IDEA but rather under Section 504 or the ADA is equally unavailing. Recasting the self-same allegations under statutory schemes other than the IDEA does not provide the Brenneises any cover. They cite *Mark H. v. Lemahieu*, 513 F.3d 992 (9th Cir. 2008), which does hold that determination of FAPE issues under the IDEA is not determinative of denial of FAPE under Section 504. The Brenneises, however, have failed to state a claim under Section 504 or the ADA.

Mark H., at 925, requires a comparison between the programs offered the disabled students and the non-disabled. The Opposition tries to twist the Counterclaim allegations into saying how the District purportedly did not meet the needs of disabled students in the manner that it does for the non-disabled. No such allegations appear in the Counterclaims, and accordingly, plaintiffs have not met *Mark H.*'s pleading standards.

In addition, it is still unclear whether plaintiffs are attempting to state a claim directly under Section 504 and the ADA or based on a violation of those statutes' regulations. To the extent their claims are based on the regulations, they must assert the applicable regulations and the nature of the violation. *Id*. The Opposition does argue at page 7, lines 25, 26, that "the conduct complained of clearly would violate 34 C.F.R. § 104.33(a) and (b)." That misses the mark. The Counterclaims do not allege 34 C.F.R. § 104.33(a) and (b) or any other regulation. If plaintiffs' cause of action is for violation of these regulations, they must so plead.

While plaintiffs attempt to portray their allegations as revealing a nefarious scheme by the District to exclude T.B. from the District, they are really only asserting a disagreement over appropriate services which is not sufficient to state a claim for discrimination. The dispute is not about whether g-tube feeding was provided, but whether it was provided "properly," which according to plaintiffs means in his IEP. Counterclaim, ¶¶ 11, 15-17; Opp., at 7:15. On the same note, the dispute is not whether a teacher was provided at all, but whether the teacher provided was properly "qualified." Counterclaim, ¶ 34; Opp., at 7:17. These are garden variety

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IEP disputes that do not evidence discriminatory intent.[1]

There is nothing alleged in the First, Second, or Third Counterclaim to meet the pleading standards of *Mark H*. The Counterclaims should be dismissed.

II. THE DISTRICT'S CLAIM FOR SANCTIONS IS WELL TAKEN

Further, nothing offered in the Opposition detracts from the fact that the Second Counterclaim is the same as the former Third Claim for Relief removed from this proceeding by the Court. Sanctions for this bald attempt to circumvent the Court's prior ruling are warranted.

The Brenneises deride the District's reliance on the Law of the Case Doctrine as "spurious." This conclusory characterization ignores the obvious. The Second Counterclaim is an attempt to have the Court reconsider the issues already framed in the former Third Claim. The District cited clear Ninth Circuit authority for this sound policy in *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, (9th Cir. 1998) 146 F.3d 1088, 1093.

The Opposition then attempts to distance the allegations in the eliminated Third Claim from the allegations in the Second Counterclaim on the ground that the Court can now hear and determine a new basis for relief grounded in Section 504 or the ADA.

Reading the Second Counterclaim, however, it is clear that its sole basis is the same IDEA claim removed by the earlier Court Order. The Counterclaim is premised on the enforceability of an administrative decision under the IDEA. The District squarely addressed this issue in the Motion and referred to it above in the Reply. As the Court previously ruled, plaintiffs' action to enforce the OAH Decision is premature when plaintiffs are simultaneously seeking to reverse that Decision. The name of the cause of action does not affect this ruling.

The Brenneises cite no authority for the proposition that this Court can direct the enforcement of an administrative law judge's rulings made in the context of an IDEA proceeding by merely guising their claim, as they do in the Second Counterclaim, as "Against SDUSD for violation of Section 504 and the ADA." Whether in the former Third Claim, no

[1] Plaintiffs do not even attempt to defend a number of their allegations as stating a claim for discrimination – e.g., that the District failed to comply with the OAH Decision by not providing OT and other DIS services. Counterclaim, ¶¶ 27, 29.

longer a part of these proceeding by Order of this Court, or in the reprise of the allegations in the Second Counterclaim, the Brenneises are seeking to enforce an IDEA decision. They have cited no authority, and the District knows of none, that creates a cause of action under Section 504 or the ADA for money damages for violation of an IDEA due process decision. Indeed, it seems obvious that the way to enforce such a decision is directly under the IDEA.

Any other result would convert all IDEA implementation claims into civil rights actions. This is contrary to the extensive case law holding that Section 504 and the ADA cannot be used to circumvent the IDEA process or to turn IDEA claims into causes of action for money damages. *See, e.g., Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006) ("We hold that where the underlying claim is one of violation of the IDEA, plaintiffs may not use § 1983- or any other federal statute for that matter-in an attempt to evade the limited remedial structure of the IDEA"); *Bradley v. Arkansas Dept. of Educ.*, 301 F.3d 952, 957 (8th Cir. 2002) ("Because the Bradleys cannot recover damages against the state officials in their individual capacities under the IDEA, they also cannot recover those damages in a § 1983 suit for violations of the IDEA"); *Sellers by Sellers v. School Bd. of City of Mannassas, Va.*, 141 F.3d 524, 529 (4th Cir. 1988) (no cause of action under Section 1983 for damages for violation of the IDEA); *Blanchard v. Morton School Dist.*, 509 F.3d 934, 935 (9th Cir. 2007) (no cause of action for damages under Section 1983 based on a violation of the IDEA).

Finally, there is no merit to plaintiffs'' argument that the Second Counterclaim and the Third Claim for Relief in the Amended Complaint can be distinguished because they assert different interests. As discussed above, the alleged injury in both instances is to educational interests. *See, Clark v. Yosemite Comm. Coll. Dist.*, 785 F.2d 781, 784 (9th Cir. 1986) ("'if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery'"). The fact is, the Brenneises are attempting to obtain relief not available under the IDEA for an alleged IDEA violation by labeling their relief as difference interests. This is simply not permissible.

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Robb, supra, at 1049-50.

The Brenneises have proceeded in defiance of the earlier Court Order and refiled a dismissed claim. The Court should impose sanctions for this brazen act.

III. THERE IS NO EXCEPTION TO THE REQUIREMENT THAT A PARTY SEEK LEAVE FROM THE COURT TO FILE A SECOND AMENDED COMPLAINT

The Brenneises argue that they did not need to request this Court's leave to amend their Amended Complaint, because they know this Court would have granted such a motion had they sought the Court's permission. Yet, Federal Rule of Civil Procedure 15(a) does not include an exception for parties with the ability to read the Court's mind.

This gamesmanship places the burden on the wrong party. Rather than meeting their burden by moving for permission to amend their complaint, the Brenneises' actions place the burden on the District to challenge the de facto amendment through a motion to dismiss and a motion to strike. As set forth supra, there are many reasons a motion to amend may not have been granted by the Court, including that the Brenneises are re-asserting already dismissed claims and claims that have not been exhausted. This disregard of appropriate procedure is just another way the Brenneises' conduct has unfairly burdened the District and warrants sanctions.

IV. CONCLUSION

The Opposition to the District's Motion to Dismiss raises nothing to undermine the District's Motion to Dismiss. The District's Motion should be granted.

DATED: August 29, 2008 MILLER BROWN & DANNIS

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